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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 2

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, a Federally Chartered Corporation,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

On Appeal from the Supreme Court for the State of Alaska

BRIEF FOR APPELLANT

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WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

On Appeal from the Supreme Court for the State of Alaska

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court for the State of Alaska, rendered June 2, 1961, is reported at 362 P. 2d 901. A copy of the opinion is contained in the separate Appendix to the Statement as to Jurisdiction, Nos.

2 & 3 O.T. 1961, filed jointly by the Metlakatla Indian Community, appellant in No. 2, and Organized Village of Kake and Angoon Community Association, appellants in No. 3. (Herein cited as "Opinion.")

The opinion of the transitional District Court for the State of Alaska, R. 59-66, is reported at 174 F. Supp. 500 (1959).

The opinion of this Court rendered in this case during the October Term 1959 is reported at 363 U.S. 555 (1960). The opinion of Mr. Justice Brennan, who, as Circuit Justice, granted appellant a preliminary injunction on July 11, 1959, is reported at 4 L. Ed. 2d 34, 80 S. Ct. 30 (1959).

JURISDICTION

The judgment of the Supreme Court of Alaska was entered on June 2, 1961, and a notice of appeal was filed in that Court on July 27, 1961. This Court noted probable jurisdiction on October 23, 1961.

The jurisdiction of this Court rests on 28 U.S.C. § 1257 (1), (2).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the Alaska anti-fish trap law, 17 SLA 1959 and 95 SLA 1959, as applied to appellant's fishing in an exclusive Federal Reserve, is repugnant to the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358, to Presidential Proclamation No. 1332, 39 Stat. 1777, as ratified by the Act of May 7, 1934, 48 Stat. 667, to Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958) and to regulations of the Secretary of the In-

terior issued thereunder, 25 C.F.R. Part 88, all of which authorize appellant to fish in the Metlakatla Reserve subject only to Federal control, and whether the Alaska Statute, therefore, violates the Supremacy Clause of the United States Constitution.

2. Whether the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332 are invalid because they were repealed by implication by the Alaska Statehood Act.

3. Whether the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332, if they were not repealed, are unconstitutional in that they are beyond the powers of the Federal Government to enact and proclaim, respectively, and whether this Court erred when it upheld the Act of 1891 and the Presidential Proclamation in *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918).

4. Whether Section 4 of the Alaska Statehood Act, which provides that Indian trust property, including fishing rights, in Alaska, "shall be and remain under the absolute jurisdiction and control of the United States," is unconstitutional in that it violates the Equal Footing Doctrine.

5. Whether Section 4 of the Alaska Statehood Act and the Alaska Omnibus Act, 73 Stat. 141, if construed as reaffirming the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332, are invalid because they have not received the express consent of the State of Alaska.

STATUTES INVOLVED

The statutes, Presidential Proclamation, and regulations involved are lengthy, and are set forth in Ap-

pendix A of this brief. Included therein are the pertinent portions of:

1. Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358.
2. Presidential Proclamation of April 28, 1916, 39 Stat. 1777.
3. Act of May 7, 1934, 48 Stat. 667.
4. Alaska Statehood Act, Sec. 4, 72 Stat. 339 (1958).
5. Alaska Statehood Act, Sec. 8(b), 72 Stat. 343-344 (1958).
6. Alaska Omnibus Act, Sec. 2(a), 73 Stat. 141 (1959).
7. Constitution of Alaska, Article XII, Section 12.
8. Constitution of Alaska, Article XII, Section 13.
9. Alaska Anti-Fish Trip Act, Chapter 17, Session Laws of Alaska, February 25, 1959, as amended, Chapter 95, Session Laws of Alaska, April 17, 1959.
10. Regulations of the Bureau of Indian Affairs, Department of the Interior, 25 C.F.R. Pt. 88 (1961 Supp.)

STATEMENT

This suit arose out of an attempt by the newly-created State of Alaska to enter a Federally-created exclusive Indian fishery reserve for the purpose of regulating the fishing rights of appellant, Metlakatla Indian Community, an Indian tribe located on the Annette Islands Reserve in Southeastern Alaska.

On March 7, 1959 the United States Department of the Interior issued regulations (see 24 Fed. Reg. 2053) *inter alia* authorizing appellant to operate during the 1959 fishing season four fish traps, located within the

Metlakatla fishery reserve, an area of about 56½ square miles.[1] These regulations merely reaffirmed a practice which had existed for many years prior to 1959. R. 6.

The State of Alaska denounced the Federal regulations as void and illegal and warned appellant that a state law which had made the operation of fish traps a crime would be applied against them. R. 13, 32-33. Appellant thereupon brought this action in the interim District Court for the State of Alaska to enjoin State officials from enforcing the anti-fish trap law within the waters of its Federally-protected and Federally-regulated reservation. The appellees moved to dismiss the complaint, R. 40, and their motion was granted. R. 69.

Since the Alaska Supreme Court had not as yet been organized when the District Court rendered its judgment, a direct appeal was taken to this Court. R. 79. Upon appellant's application, Mr. Justice Brennan entered a stay which permitted fishing during the 1959 season and thereafter

> pending . . . disposition by this Court of said petitions . . . as [appellants] have been authorized by the Secretary of the Interior of the United States pursuant to his Regulations of March 7, 1959, 24 Fed. Reg. 2053, or as [appellants] may from time to time be authorized by him.

After the appeal had been docketed in this Court but before it had been heard, the new Supreme Court

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[1] The size of appellant's water reservation was calculated for the appellees by Mr. Miro Mihelich, a civil engineer. His affidavit is appended to appellees' brief before the Supreme Court of Alaska.

for the State of Alaska was created. Out of an abundance of caution, appellant then filed a second appeal from the judgment of the District Court, this time with the Supreme Court of Alaska.

After hearing this case at the October Term 1959, this Court determined that it had jurisdiction, but concluded that it would "refrain at this stage from deciding the merits of this appeal so as to afford the Alaska Supreme Court the opportunity to rule on questions open to it for decision." 363 U.S. at 562. It pointed out that the Alaska Court could hold as a matter of State law that the fish trap statute did not apply to Metlakatla Indian fishing, thus ending the litigation without raising a Federal question. Accordingly, the Court held the appeal from the District Court on its docket, continued the preliminary stay in effect, and directed the parties to seek a determination of the appeal pending in the Alaska Supreme Court.

Appellant thereupon prosecuted its appeal in the State Supreme Court. That Court affirmed the judgment below. It held that the State statute did apply to Indian fishing and that the Federal statutes, proclamation, and regulations on which appellant's claim of right rested were void and of no effect.

While this litigation was pending, on June 2, 1960, the United States Department of the Interior issued new Alaska fishing regulations, 25 Fed. Reg. 4865, replacing those promulgated in 1959. The only significant change in these regulations as far as appellant is concerned, is that, while the earlier regulations applied to one fishing season only, the new regulations are of indefinite duration. 25 C.F.R. § 88.8 (1961 Supp.).

SUMMARY OF ARGUMENT

Appellant contends that the attempt by the State of Alaska to prohibit trap fishing within its reservation is in direct and total conflict with acts of Congress, a proclamation and regulations of the Executive branch and two decisions by this Court.

Federal concern for the Metlakatlans—whose ancestors were known as "people of the fish traps"—began in 1887 when this group of Indians settled on the Annette Islands in Alaska at the express invitation of officials of the United States Government. In 1891, Congress approved the action theretofore taken by the Executive branch by making the land and waters of the Annette Islands a statutory Indian reservation. The boundaries of the water reserve were clearly defined by a Presidential Proclamation issued in 1916 and the reservations theretofore made were reaffirmed by Congress in 1934. During this 70-year period, the Metlakatla water reservation has been twice sustained by this Court.

With the financial and technical support of the Bureau of Indian Affairs, the Metlakatla Indian Community has been able to accumulate the capital necessary to construct and maintain several fish traps and a cooperatively-owned cannery. These investments continue to be the economic backbone of the community. Traps permit the more efficient and economical capture of salmon than is the case with mobile gear. The cannery provides much needed employment and, in good years, a profit for investment in community health and welfare projects and public works. Without traps, however, the cannery and thus the economic life of the community would collapse. For this and other reasons

Congress and the Executive branch have not terminated or diluted their role as guardians and protectors of this Indian community. Rather, they have expressly authorized appellant to continue its accustomed methods of fishing.

At the time Alaskan statehood was being considered, Congress was greatly concerned that Indian and native rights, including fishing rights, might be impaired by statehood. Although the law is clear that existing Indian rights could not be abridged by silence or by implication, Congress, out of an abundance of caution, wrote its concern into Section 4 of the Statehood Act by reserving Indian fishing rights to the "exclusive jurisdiction and control of the United States."

Notwithstanding this uninterrupted course of Federal concern for the economic welfare of the appellant, the Alaska Supreme Court has concluded that the Metlakatla fishing reservation has been extinguished. Yet it has not been able to point to any Congressional action on which this conclusion of law can be based. Moreover, nothing contained in the record or in the opinion of the courts below offers any possible justification of a social or economic nature for the State's invasion of Metlakatla's rights. The only grounds for such interference are emotional and political, which can never justify a State's denial of a Federal right. *Cooper* v. *Aaron,* 358 U.S. 1 (1958).

Even if social or economic arguments had been advanced in support of the exercise of the State's police powers, they would not have been relevant to the legal issues in this case because control of fishing within appellant's reservation has been preempted by the Federal Government. The exercise of State police power

in such manner as to destroy Metlakatla's fishing rights, which rights (1) were established and have been repeatedly confirmed by Congress, the President and this Court, (2) have been expressly preserved from State regulation and control by the Act of Congress admitting Alaska into the Union, and (3) have continued in existence to the present day with the consent and encouragement, and under the express regulations of the Secretary of the Interior.

In its first opinion in this case, this Court decided that even though it had jurisdiction, it would give the newly-created Alaska Supreme Court, which had not as yet spoken on the matter, an opportunity to pass on the merits of the case. It did so because (1) if the State Court decided for appellant on State grounds "a constitutional question now appearing on the horizon might disappear," 363 U.S. at 562, and (2) if it decided for appellees it could assist this Court by furnishing enlightenment on "local economic and social considerations pertinent to the scope of the so-called police power", Id. at 561, which might possibly serve as justification for the State legislation.

The Supreme Court of the State of Alaska has now spoken. As it decided in favor of the assertion of State power, the constitutional question is once again before this Court. But the enlightenment which this Court requested has not been offered. The substantive record for this second appeal has not been enlarged. It is identical with the substantive record in the first appeal. Moreover, the State Court's 76-page opinion is almost exclusively devoted to legal discussion. The few, isolated observations on economic conditions contained in the opinion are (a) not founded on any rec-

ord, (b) not pertinent to the exercise of the police powers, (c) in parts misleading and incomplete.

As this case returns to the Supreme Court of the United States, the questions before it two years ago have been substantially broadened by the wide sweep of the decision rendered by the Supreme Court for the State of Alaska. In its opinion, the State Court found three Federal statutes, a Presidential proclamation, and a set of regulations of the Secretary of the Interior invalid and, in its holdings, in effect took issue with contrary holdings by this Court. The implications of the Alaska Court's decision are, in fact, so far-reaching that they challenge not only Metlakatla's fishing rights, but also the Community's possession of its very home, the upland of the Annette Islands.

There is one further element of confusion in the Alaska Supreme Court's opinion to which appellant wishes to draw the Court's attention. The claim of legal rights asserted by appellant Metlakatla is clearly distinct from the claim asserted by appellants Kake and Angoon in the companion case. Nevertheless, throughout this litigation appellees, as well as the Alaska courts, have failed to state with exactitude which arguments and holdings, respectively, apply to each case.[2] The resulting lack of specificity, intertwined with dark hints of Indian claims extending to all of Alaska's waters, has clearly been detrimental to appellants in both cases. In this brief, we wish to make clear again,

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[2] The Alaska Supreme Court observed at one point:

> Although *most* of the foregoing opinion applies to Metlakatla as well as to Kake and Angoon, certain additional facts require a separate discussion of Metlakatla's claims. (Emphasis supplied.) [Opinion, p. 54a.]

that the Metlakatla Indian Community claims the right to fish with traps only within the boundaries of its Federal reservation—in an area of 56½ square miles, less than 1% of the total water mass of Southeastern Alaska[3] and an infinitesimal fraction of the total Alaskan water mass.

Appellant wishes to stress the limited character of the right claimed by it because of a most serious misunderstanding contained in the Alaska Supreme Court's opinion. The Court states:

> The absolute jurisdiction claimed to be reserved in the United States is the right to regulate and control all fishing by Indians anywhere in Alaska. There are natives in all parts of Alaska. Approximately 42 per cent of the fishing population reported in the 1950 census were natives. If the full scope of the claimed power were eventually exercised by the Secretary of the Interior, only permanent chaos and conflict could result. The magnitude of the power claimed is such that the effect could be to render useless or futile any effort by the state to regulate. [Opinion, p. 27a.]

The fact of the matter is that while Metlakatlans fish in many parts of Alaska, both outside and within their reservation, they have never questioned the power of the State to regulate their fishing once they leave the reservation waters. It is only within the aforementioned 56½ square miles that an exemption from State control has been claimed. That the Court did not recognize this is difficult to understand in view of appellant's repeated explanation of the geographic limits

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[3] The total water mass of the Southeastern Alaska Panhandle measures 7,500 to 8,000 square miles, more or less. R. 74.

of its claim in the complaint, R. 9-10, 16, as well as in the briefs and during oral argument before the Alaska Supreme Court.

II. FACTUAL BACKGROUND OF THIS DISPUTE

During oral argument at the October Term 1959 hearing in this case Mr. Justice Frankfurter observed that he wished that counsel had put more flesh on the legal bones of this case, so that the Court would have a better understanding of the underlying reasons for this controversy. This thought was also reflected in the suggestion contained in this Court's opinion that if the Alaska Supreme Court decided for the State it could assist this Court by furnishing enlightenment on "local economic and social considerations pertinent to the scope of the so-called police power", 363 U.S. at 561. Such information, it was thought, might serve to justify the action of the Alaska legislature.

1. The Legal Relevance of Socio-economic Data

As already indicated, the record has not been enlarged to supply further evidence on social and economic conditions tending to support the State's position. Consequently, the only evidence before the Court on socio-economic questions is that contained in the affidavits submitted in the trial court by the appellant. R. 21, 32, 37.[4] But even if the record contained information tending to support the attempted exertion of Alaska's police power within appellant's reservation,

[4] Appellees submitted ten affidavits. Six attempt to prove that appellant's alleged injury is speculative since the fish formerly caught by traps might be caught by mobile gear. R. 41-42, 51-53. The other four are the affidavits of a police officer, R. 70-71, two geologists, R. 72-74, and one historian, R. 75-76. None of them contain information relevant to the social and economic conditions which might have led the Alaska legislature to outlaw trap fishing.

such information could not be given weight under the circumstances of this case.

From the early days of the Republic this Court has frequently held that a State may exercise its police powers to regulate a field which the Constitution reserves to Congress, providing, (1) Congress has not acted so as to "occupy the field", (2) the State's regulations do not substantially burden or interfere with national interests as reflected in the Constitution itself, and (3) the State can demonstrate a legitimate local interest in such regulation. The most recent reaffirmation of this doctrine is *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). In applying those general principles, it has often been necessary to balance the depth and intensity of the local interest against the degree of interference with the Federal interest. The interstate commerce cases, for example, have required a judgment of whether the State's interest in highway safety is sufficiently acute to outweigh the nation's interest in an uninterrupted flow of commerce. Depending upon the particular facts of the case, the balance has been struck both for and against State regulation. Compare *South Carolina State Highway Department* v. *Barnwell Bros.,* 303 U.S. 177 (1938) with *So. Pacific R.R.* v. *Arizona,* 325 U.S. 761 (1945), and *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1960). This balancing of State and Federal interests requires, of course, socio-economic information concerning the State's justification for its attempted regulation.

Appellant respectfully submits, however, that the instant case is not of the foregoing type. Congress *has* acted to occupy the field. In 1891 it provided that the Metlakatla Community may use its reservation "under such rules and regulations, and subject to such

restrictions, as may be prescribed from time to time by the Secretary of the Interior." 26 Stat. 1101, 48 U.S.C. § 358. And in granting statehood to Alaska in 1958, Congress most emphatically declared that Indian fishing rights in the new state "shall be and remain under the absolute jurisdiction and control of the United States." Alaska Statehood Act, Sec. 4, 72 Stat. 339 (1958): Moreover, the State's attempted regulation is not a peripheral intrusion or tangential regulation of a matter of Federal interest. The State's efforts to abolish appellant's traps go to the very heart of the Federal concern for the appellant. The record is uncontradicted that if appellant were deprived of traps it would "wither and die". R. 21. This result would be in diametric conflict with the repeated Federal concern for the economic welfare of the appellant. In such circumstances, appellant submits that State law must yield, regardless of the economic or social justifications which might be offered.

This Court has unswervingly held that "[t]he United States may perform its functions without conforming to the police regulations of a state." *Arizona* v. *California*, 283 U.S. 423, 451 (1931) citing, *inter alia*, *Hunt* v. *United States*, 278 U.S. 96 (1928). The latter case involved an attempt by the State of Arizona to enforce its game laws within a national forest and game reserve. In order to reduce overgrazing, the Secretary of Agriculture had authorized the killing of large numbers of deer on federal land. Arizona proceeded to arrest three hunters. This Court upheld an injunction against the State's attempted enforcement of its game laws, saying:

> [T]he power of the United States to thus protect its lands and property does not admit of doubt

> [citations omitted], the game laws or any other statute of the state to the contrary notwithstanding. [278 U.S. at 100.]

In the field of Indian affairs, the power of Congress has long been recognized as "[p]lenary," *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565 (1903), and as "paramount and of a most sweeping character." *People ex rel. Ray* v. *Martin,* 294 N.Y. 61, 60 N.E. 2d 541, 545 (1945), *aff'd* 326 U.S. 496 (1946). The limitation on the power of states to enforce their criminal laws in the Indian country has been recognized in a long line of cases from *Worcester* v. *Georgia,* 6 Pet. (31 U.S.) 515 (1832), to *Williams* v. *Lee,* 358 U.S. 217 (1959). As this Court said in the latter case:

> [W]hen Congress has wished the States to exercise—power [over Indians] it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* had denied. [*Id.* at 221.]

No such grant of jurisdiction has been made in the instant case.

2. Alaska's Antipathy to Fish Traps

While the Court would thus be able to proceed, without further ado, to a consideration of the questions of law in this case, appellant desires to comply with the Court's request for background information. Such information is offered merely to inform the Court of the political dispute out of which the present legal controversy has grown.

At this stage in history, Alaskan opposition to the eleven fish traps which remain of the more than 700 which once were in operation is based on emotion rather than on rational considerations of an economic or social

nature. The opposition is based on views and attitudes which were formed prior to Alaska's accession to Statehood, when fish traps were first and foremost *symbols of the colonial exploitation of Alaska by "Stateside" fishing and canning interests.* This view of the fish trap was most vividly expressed by Governor, now Senator, Ernest Gruening, in his Keynote Address to the Alaska Constitutional Convention, delivered on November 5, 1955:

> The people of Alaska have repeatedly and unchangingly manifested their overwhelming opposition to fish traps. It isn't necessary to rehearse all their reasons—the results have amply justified the Alaskans' position. But fish trap beneficiaries, residents of the mother country, want to retain their Alaska traps. So the traps are retained. And it is the power and authority of the federal government which retains them. In a clear-cut issue between the few, profiting, non-colonial Americans and the many, seriously damaged, colonial Alaskans, the state-side interest wins hands down. And it wins because the government, which is also supposed to be *our* government, throws its full weight on their side and against us.[5] [GRUENING, LET US END AMERICAN COLONIALISM 20 (1955).]

Alaska's resistance to the fish trap, as exemplified by Senator Gruening's remarks, was basically resistance on the part of local fishermen to automation and, more

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[5] Alaska was apparently unique among the organized Territories in having control of its fisheries vested in Washington rather than the territorial legislature. See testimony of Mastin G. White, Solicitor, Department of the Interior, in *Joint Hearings on S. 1446 and H.R. 3859 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce and Subcommittee of the House Committee on Merchant Marine and Fisheries,* 80th Cong., 2d Sess. 11 (1947). See also testimony of W. C. Arnold, Id. at 61-63.

particularly, and especially, to automation under non-resident auspices. Many of Alaska's residents were fishermen, with limited financial resources. Fish traps, which cost from $10,000 to $20,000 each year to acquire and install, were beyond their means. Testimony of Warner W. Gardner, Assistant Secretary of the Interior, in *Hearings on S. 1446 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 80th Cong., 2d Sess. 7 (1947). As the Court below correctly states: "The cost of construction and operation [of a fish trap] excluded the average Alaska fisherman from its use and in time the operation of fish traps became generally concentrated in the cannery owners and operators". Opinion, p. 7a.

Yet once the investment in a fish trap is made, the cost of operation is minimal. It needs neither the labor nor the fuel which a seine boat requires. "The labor costs of operating a trap are quite small; only two watchmen are needed and by and large with a reasonable salmon run, the salmon trap is substantially cheaper than seine fishing, so far as the price per salmon caught is concerned." Testimony of Assistant Secretary Gardner, *op. cit. supra* at 7.

We are thus faced here with the familiar struggle of man against machine. What accentuated the struggle was that man was the voteless, frustrated, and often very poor Alaska resident, while most of the machines were owned by large corporate interests controlled by non-residents. As aggressive, insufficiently regulated fishing *by all types of gear* depleted Alaska's

fish resources,[6] the residents, fishermen and non-fishermen, became increasingly bitter against the industry which, in their view, exploited the Territory's economic resource for the benefit of non-residents, while making no contribution whatever to the local economy. Even the seasonal labor to operate the fish traps and the company-owned canneries was imported on a short-term basis from "the States". The late Senator Richard L. Neuberger pointed out that in 1946 the canneries paid almost two-thirds of their total wage bill to non-residents. These workers were generally "boated northward from 'the States', and do not receive pay until the boats dock again in Seattle. Thus Alaska does not even get their chewing gum and cigarette business." *Survey Graphic Magazine,* February, 1948, reprinted in LIBERATE ALASKA FROM THE FISH TRAP 60 (1948).

To the embittered Alaska fishermen, the large canning company and its favorite gear, the fish trap, became a single concept. As one observer put it, "The fish trap, therefore, is looked upon by most Alaskans as the dipper with which the large absentee owner appeared to skim with relative ease the cream of one of the Region's most valuable resources, and then carried away to the Outside the fullest part of the wealth so garnered." ROGERS, ALASKA IN TRANSITION 11 (1960).

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[6] Even in their heyday the fish traps accounted for only one half of the total salmon catch. Tables submitted by Seton H. Thompson, Chief, Branch of Alaska Fisheries of the Department of the Interior in *Hearings on H.R. 1515 before the Subcommittee on Alaskan Problems of the House Committee on Merchant Marine and Fisheries,* 81st Cong., 1st Sess. 28 (1949).

Upon Alaska's accession to Statehood, the fish trap, the symbol of colonial exploitation, was abolished. Most of the more than 400 traps which were still in operation in 1958, were closed down. All that remained were 11 Indian-owned traps which the Secretary of the Interior expressly permitted to operate. Four of these traps belong to Metlakatla.

The closing down of 97% of the fish traps which operated in 1958 has eliminated the trap as a serious economic threat to the Alaska fishermen. In recent years the appellant's traps caught only the following percentage of the total catch:

Year	Alaska Salmon Pack Total[7]	Metlakatla Trap Caught Salmon Pack[8]	Percent (%)
	(Standard 48-pound cases)		
1955	2,457,969	5,793	.23
1956	2,950,354	13,845	.47
1957	2,441,894	8,308	.34
1958	2,984,371	25,763	.80
1959	1,770,795	13,332	.75
1960	2,549,545	3,249	.12

What is equally significant is that the anti-colonial argument simply does not and never did apply to Metlakatla. The Community's traps have served as a foundation which has enabled the Community to operate a successful cannery. R. 21, 36. *Both the traps and the cannery are owned by the Metlakatla Indian Community.* No non-resident's interest is here involved. (In fact, the Metlakatlans, whose forebears

[7] Pacific Fisherman Yearbook, p. 94 (Jan. 25, 1959), and information obtained from United States Fish and Wildlife Service.

[8] R. 33 and information obtained from United States Fish and Wildlife Service.

have been known as "People-of-the-salmon-traps", have been residents of Alaska and users of fish traps longer than many of the fishermen who called for their abolition in the name of anti-colonialism.) The employees at the cannery are Alaskans. The cannery's payroll is disbursed and spent in Alaska. Moreover, the profits of the canning operation, rather than being skimmed off the Alaskan economy as was the case elsewhere, are spent in Alaska on public improvement projects.

There remains one other contention which has occasionally been advanced: that fish traps are harmful from a conservation point of view. The makeweight character of this argument is explained in the following authoritative statement contained in a legislative report by the Department of the Interior:

> Various arguments have been urged in favor of eliminating the traps, not all of which have equal validity. For example, it is sometimes argued that the traps should be abolished as a conservation measure. Years of experience give no support to this argument. The basic conservation problem is one of permitting escapement of sufficient salmon to maintain the runs in succeeding years. That can be done as easily through regulating the traps as through regulating other types of gear.
>
> It is the economic arguments in favor of abolishing the traps which are decisive. Traps are a form of fishing equipment which require capital outlays beyond the capacity of most individual fishermen to finance. Salmon are also caught in Alaska with purse seines, beach seines, gill nets, troll lines, and other types of gear. These are commonly owned by individual fishermen conducting small-scale operations. [Letter of Douglas

McKay, Secretary of the Interior, to Herbert C. Bonner, Chairman, House Committee on Merchant Marine and Fisheries, printed as Appendix B to Brief for Appellant, No. 326, October Term 1959.]

In the view of the United States Fish & Wildlife Service, the sole conservation question is one of adequate escapement of fish to permit spawning and sustained reproduction. The conservation evil is overfishing whether by traps or nets or a combination of the two. The Secretary's regulations, under which appellants now fish, preclude overfishing by the Community. Only four of its eight potential sites are authorized for trap fishing. 25 C.F.R. 88.2(e) (Supp. 1961) In addition the regulations incorporate by reference Alaska's conservation regulations. Appellant's traps can fish only during those periods in which mobile gear can operate in the area surrounding the Metlakatla reservation. 25 C.F.R. 88.2(d) (Supp. 1961)

The economic and social arguments advanced by opponents of fish traps, though not contained in the record, have thus been shown to be wholly inapplicable to the situation now before this Court. By contrast, the record does contain evidence pointing to the significant social and economic benefits derived by the Metlakatla Indian Community from the traps and the cannery which they support. These benefits take the form of (1) employment of members of the Community in the cannery, R. 32, and (2) utilization of the profits of the cannery by the Community for public works and other services of community improvement, R. 21, which provide employment for fishermen in the off-season and help make Metlakatla an attractive, forward-looking Community, R. 32.

To the average individual fisherman, fishing provides seasonal employment at a level of income which makes it difficult to sustain a family year-round. The payroll at the cannery as well as the cannery profit ploughed back through off-season employment have given the Metlakatla Community the economic and social stability which it would never be able to achieve were it to depend on employment and income from fishing alone. In fact, few fishing and canning operations in Alaska are organized as sensibly as the one which the State of Alaska here seeks to destroy for emotional and political reasons.

III. APPELLANT'S FISHING RIGHTS WERE CREATED BY CONGRESS AND HAVE BEEN CONTINUALLY REAFFIRMED BY CONGRESS, THE EXECUTIVE AND THIS COURT DOWN TO THE PRESENT DAY

A. The 1891 Act Created Appellant's Fishing Rights

The four fish traps which appellant and the United States seek to protect against the State's effort to outlaw their operation are located within the exclusive fishery which is part of the Metlakatla Indian Reservation. That Reservation was established for the Metlakatla Community under the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358. The Act provides:

> Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans, who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be pre-

scribed from time to time by the Secretary of the Interior.

When the Metlakatla Reservation was established in 1891, the Territory's sparse population and its limited significance to commercial interests evidently made it unnecessary to define by metes and bounds the limits of the Community's fishing rights. In the early decades of this century, however, West Coast fishing and canning companies became increasingly active in exploiting Alaska's natural bounty and began to interfere with fishing by the Metlakatlans in their own homeland. This caused President Wilson in 1916 to issue a proclamation which defined the Metlakatla fishery reserve in the following terms:

> Whereas the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and
>
> Whereas it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery,
>
> Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved

for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned. [39 Stat. 1777.]

The 1916 Proclamation was given statutory recognition in 1934 when Congress declared the Metlakatlans to be citizens of the United States. The Act of May 7, 1934, 48 Stat. 667, provides:

(c) The granting of citizenship to the Indians described in Section 3(b) of this title shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakahtla Colony. Any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to modification, alteration, or repeal by the Congress or the President, respectively.

B. Metlakatla's Fishing Rights Have Been Affirmed By This Court

Since its creation in 1891, this Court has had two occasions to consider the validity of Metlakatla's exclusive water reservation. In the first case, it affirmed them expressly. On the second occasion it made use of the principle previously established to sustain the exclusive fishery of another Indian community.

Express affirmation of Metlakatla's fishing rights as well as an authoritative analysis of the origins of the Community are to be found in *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918). That case was a suit brought by the United States on behalf of Metlakatla to exclude a commercial canning company from erecting traps in the waters immediately adjacent to the Annette Islands. Upholding the Government's contention that these waters were exclusively reserved for the use of Metlakatla, this Court said:

> The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this, the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation . . . Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland,—in other words, as descriptive of the area comprising the islands. [248 U.S. at 89.]

Throughout this litigation, the State of Alaska has emphasized that the *Alaska Pacific Fisheries* opinion fails to make express mention of the 1916 Presidential proclamation. The court below, too, states that this Court "ignored" the Presidential proclamation. Opinion, p. 57a. Appellee and the State Court have overlooked, however, the last and most decisive words in the *Alaska Pacific Fisheries* opinion which are "Decree"

affirmed". The decree in question "ordered that the defendant Alaska Pacific Fisheries vacate the lands and waters mentioned *in the proclamation of the President of the United States on April 28, 1916. . . .*" (Emphasis supplied.) *Alaska Pacific Fisheries* v. *United States,* 240 Fed. 274, 275-6 (9th Cir. 1917).[8]

The second case in which this Court has had occasion to consider appellant's fishery reserve is *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86 (1949). There the Court sustained the validity of another water reserve, namely that established by the Secretary of the Interior for the Karluk Indians of Alaska. One of the Court's principal reasons for concluding "that the Secretary of the Interior was authorized to include the [surrounding] waters in the [Karluk] reservation",[9] *Id.* at 116, was the principle established in *Alaska Pacific Fisheries* v. *U. S., supra,* namely, that an exclusive water reservation surrounding a land reservation is essential for the welfare of the Alaska Indian people and must, therefore, be held an integral part of the total reservation. *Id.* at 114.

C. The Alaska Statehood Act Expressly Preserved Appellant's Fishing Rights

Throughout the course of this litigation neither appellees nor the State courts which have considered the matter have pointed to any statute which repealed, amended, or otherwise modified the rights granted under the 1891 Act. At best they have hinted at repeal

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[8] As previously mentioned, Congress ratified the 1916 Presidential proclamation in 1934.

[9] The Court then went on to decide that while the Karluk reservation was validly established, the criminal sanctions of the White Act could not be used to protect it.

or amendment by implication. Yet it is an established canon of statutory construction that an earlier specific statute is not repealed by implication by a subsequent general statute. Ex parte *Crow Dog,* 109 U.S. 556, 570-71 (1883). Until explicitly repealed or amended, the Act of 1891 must be accorded the force and effect it had upon enactment. Had Congress chosen to terminate appellant's Federally-protected fishing rights at the time Alaska became a State it could undoubtedly have done so. But absent Congressional action, this Court would surely not allow Indian rights to be destroyed. Cf. *Williams* v. *Lee,* 358 U.S. 217 (1959).

In the instant case, far from having any basis for finding a sub-silentio repeal of the Metlakatlans' fishing rights, we have an express Congressional reaffirmation of existing Indian fishing rights. Throughout the ten years of legislative activity on the Alaska statehood issue, Congress never deviated from its firm intention to retain absolute jurisdiction over Indian fishing rights and preserve them from State control. This Congressional will was given explicit expression in Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958), as amended, 73 Stat. 141 (1959), which provides:

> As a compact with the United States said State and its people do agree and declare *that they forever disclaim all right and title . . . to any lands or other property (including fishing rights),* the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, *shall be and remain*

> *under the absolute jurisdiction and control of the United States* until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe . . . (Emphasis supplied.)

Congress could hardly have chosen other words to make it plainer that, as a condition of statehood, Alaska and its people must disclaim *all* interest in Indian property, expressly including "fishing rights", and that as a result of this disclaimer "absolute jurisdiction and control" over "such" property (including fishing rights) is to "be and remain in the United States." The clarity of Section 4 should make unnecessary any further examination of the legislative history. *United States* v. *Missouri Pac. R.R.*, 278 U.S. 269, 277-78 (1929).

An examination of the legislative history of a decade of Alaska statehood bills would, however, merely reinforce what is readily apparent in the language of Section 4: all control over Indian fishing was to "be and remain" solely in the United States. To avoid burdening the brief with a lengthy recital of legislative history, we refer the Court to the Appendix to appellant's brief in No. 326, October Term 1959. It is sufficient for present purposes to point to the statement of the first committee to report out an Alaska Statehood bill to either house of Congress:

> *The basic intent* of paragraph Second, Section 3, insofar as it deals with matters affecting the Indians, Aleuts, and Eskimos, *is to protect the natives of Alaska against the possibility of infringement of their property rights by the proposed new state,* and to maintain unimpaired the authority of the Congress over the use and disposition of native property in Alaska. Provisions to this effect are

> a customary feature of enabling acts admitting new States to the Union. [H.R. REP. No. 1731, 80th Cong., 2d Sess. 31 (1948).] (Emphasis supplied.)

Congress never deviated from this original "basic intent" to protect Indian property rights "against the possibility of [State] infringement." In fact, it strengthened its initial resolve by adding to Section 4 the parenthetical phrase "(including fishing rights)," to make clear that Indian property rights included fishing rights. The Senate Committee which added that parenthetical phrase stated in its report:

> The bill [H.R. 331, 81st Cong.] provides the machinery for accomplishment of [Alaska's admission] by—
>
> . . .
>
> (5) Providing . . . for transfer to the State of the highly important Alaskan fisheries and wildlife, *except those which* are subject to international agreement or *are included within the reserved native rights.* (S. REP. No. 1929, 81st Cong., 2d Sess. 1-2 (1950) (Emphasis supplied.)

The language and history of Section 4 of the Alaska Statehood Act thus demonstrate a firm Congressional resolve to maintain the *status quo* prior to statehood with respect to Indian fishing rights. Indeed appellees have conceded as much.[10] Having so conceded, they cannot prevail, for they cannot escape the fact that, as far as Metlakatla is concerned, the status quo prior to statehood was the Community's unassailable right to

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[10] In their brief to this Court in the first hearing of this case, appellees stated: "Clearly, the intent of Congress was to maintain the *status quo.*" Brief for Appellees, Nos. 326, 327 October Term 1959, p. 31.

fish in reservation waters, subject only "to such rules and regulations as the Secretary of the Interior shall provide."

D. Executive Regulations Confirm Appellant's Right to Fish With Traps

The Executive branch has long authorized and even encouraged[11] appellant to fish in its reservation waters by means of traps. Indeed, it was almost fifty years ago that the Secretary of the Interior first specifically authorized appellant's trap fishing, by ordering on February 11, 1915:

> That, until otherwise ordered by the Secretary of the Interior, natives or associations of natives of Metlakatla who have secured the approval of the Council of the Annette Islands reserve be given permits by the Secretary of the Interior to erect salmon traps on the shores of Annette Islands. R. 6.

From that date forward, the Secretary has continually authorized trap fishing in the waters surrounding the Annette Islands, and appellant has so fished.

The current regulations were issued to implement Section 4 of the Statehood Act, which specifically reserves to the United States "absolute jurisdiction and control" over Indian "property (including fishing rights)." Those regulations state: "Salmon trap fishing is permitted". 25 C.F.R. § 88.2(d). Thus the regulations, though limiting the number of fish traps which appellant can operate, confirm that those traps which are authorized may operate lawfully.

If there were any doubt of the Secretary's authority to promulgate those regulations, it must be dispelled

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[11] See, *e.g.*, R. 31, 34.

by the familiar rules that "[a]n administrative order is presumptively valid," *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949), and that the Secretary's interpretation of his statutory authority is entitled to "considerable weight", *Ketchikan Packing Co.* v. *Seaton*, 267 F. 2d 660, 663 (D.C. Cir. 1959), especially where it is contemporaneous with the statute under which it is promulgated, see *Mazer* v. *Stein*, 347 U.S. 201, 213 (1954), *Great Northern R.R.* v. *United States*, 315 U.S. 262, 275 (1942), and where he played an important role in its drafting, see *Adams* v. *United States*, 319 U.S. 312, 314-15 (1943).

Here, the Secretary, who played a major role in the drafting of Section 4 of the Statehood Act, promptly in 1958 issued new regulations, 23 Fed. Reg. 8874 (1958), designed to identify the pre-existing fishing rights of Indians in Alaska which the Statehood Act had preserved. Surely no one was better equipped than the Secretary to determine what these pre-existing fishing rights were. Regulations of the Department of the Interior had authorized trap fishing in appellant's reservation without interruption since 1916. The Secretary and his predecessors participated in the drafting and implementation of the 1891 Act, and have long been intimately familiar with all aspects of Alaskan fishing by virtue of their responsibilities under the White Act, 43 Stat. 464-67, 48 U.S.C. §§ 221-228. Thus, any challenge to his determination that Section 4 authorized appellant to continue to fish with traps in reservation waters "is too restrictive in view of the history and habits of Alaskan natives and the course of administration of Indian affairs in that Territory." *Hynes* v. *Grimes*, *supra*, 337 U.S. at 110-111.

IV. THE SUPREMACY CLAUSE PROHIBITS THE STATE OF ALASKA FROM DESTROYING APPELLANT'S FEDERAL RIGHT TO FISH WITH TRAPS

Appellant has demonstrated that its right to fish was created by and remains today under the protection and control of the United States Government. This being the case, State interference is precluded by the Supremacy Clause of the U. S. Constitution for at least three reasons.

A. State Law Does Not Apply on an Indian Reservation Unless Congress Expressly So Provides

Clearly Congress acted within its Constitutional authority when creating the Metlakatla Reservation and ratifying President Wilson's Proclamation. *Alaska Pacific Fisheries* v. *United States, supra; United States* v. *McGowan,* 302 U.S. 535 (1938).

As pointed out in Part II of this brief, this Court has unswervingly held that Congress can through the exercise of Federal power in the Indian country constitutionally exclude State authority. *Worcester* v. *Georgia,* 6 Pet. (31 U.S.) 515 (1832); *Williams* v. *Lee,* 358 U.S. 217 (1959). The proposition was forcefully stated in *The Kansas Indians,* 5 Wall. (72 U.S.) 737 (1866), a landmark case in which this Court held that Kansas could not tax Indian land:

> There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property or other rights, which it would have been competent to make if Kansas had not been admitted into the Union . . . As long as the United States recognizes [the Indians'] national character they are under the

> protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws. [*Id.* at 756-57]

B. Alaska's Efforts to Outlaw Trap Fishing Must Fail Under the Familiar Tests of the Doctrine of Preemption

In the instant case it is perfectly clear that any attempt by the State to enforce its anti-fish trap law would produce total and irreconcilable conflict with the rights granted under the 1891 Act and preserved by Section 4 of the Alaska Statehood Act, as these rights are defined in the Secretary's regulations. Indeed the conflict could not be more blatant: one sovereign says appellant may fish with traps; the other says it may not.

To make the case of preemption even clearer, however, a Congressional statute explicitly precludes the application of Alaska criminal jurisdiction to Indian fishing rights. In 1958 Congress tendered to the then Territory of Alaska general criminal jurisdiction over the Indian country on the same terms as it previously had to several states, 72 Stat. 545, 18 U.S.C. § 1162(a); and the State of Alaska has, by the terms of the act, succeeded to this authority. But that act, before and after Alaska's inclusion, most explicitly reserved in the United States control over Indian fishing by stating:

> Nothing in this Section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity under Federal treaty, agreement, or statute with respect to hunting, trapping, *or fishing or the control, licensing, or regulation thereof.* 67 Stat. 588, 18 U.S.C. § 1162(b). (Emphasis supplied.)

In view of the irreconcilable conflict between State and Federal law, Alaska's attempt to close down appellant's

traps must fail. *Gibbons* v. *Ogden,* 9 Wheat. (22 U.S.) 1 (1824). See also *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148 (1942); *Hines* v. *Davidowitz,* 312 U.S. 52 (1941).

C. Alaska's Efforts to Regulate Appellant's Fishing Rights Constitute an Illegal Interference With a Federal Instrumentality

State control of appellant's fishing rights would violate the doctrine that a State law which taxes, burdens or otherwise interferes with the operation of a federal instrumentality is void under the Supremacy Clause. *M'Culloch* v. *Maryland,* 4 Wheat. (17 U.S.) 316 (1819).

Appellant is a "federal instrumentality" in law, *Alaska* v. *Annette Island Packing Co.,* 289 Fed. 671 (9th Cir. 1923),[12] as well as in fact. The record shows that the Metlakatla Indian Community:

(1) Is a Federally-recognized Indian Tribe. R. 36.

(2) Operates under a Constitution and under a Federal Charter, both approved by the Secretary of the Interior on August 23, 1944. R. 5.

(3) Has, since 1915, been specifically authorized by the Secretary of the Interior to fish with traps. R. 6, 9.

(4) Has received loans from the Bureau of Indian Affairs to help develop its fishing and cannery enterprise. R. 31.[13]

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[12] That case holds that the Alaska Territorial Legislature could not impose generally applicable occupation and income taxes upon the Annette Island Packing Co. because the company was a Federal instrumentality and "the tax, if permitted, might be destructive of the means adopted by the [Federal] government to carry out its purposes and obligation." 289 Fed. at 673.

The uncontradicted record further shows that enforcement of the State anti-fish trap act would seriously burden, and ultimately destroy, this Federal instrumentality:

(1) The Community operates its own fish traps and cannery. All of the profits of the cannery are paid over to the Community, and the entire economy of the Metlakatla Community is based on the cannery. R. 10-12, 30-32, 34-35.

(2) Without the traps the cannery would be unable to obtain enough fish to operate economically. It would thus be forced to shut down entirely and thereby deprive the Community of its major source of income. R. 21.

(3) If the cannery were shut down the Community would default on its obligations to repay its loans to the Rural Electrification Administration and the Indian Revolving Loan Fund, R. 57, and would become dependent on welfare aid from the Federal Government, and the State of Alaska. R. 32.[14]

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[13] Mr. Justice Brennan, in his opinion granting a temporary restraining order, summarized these facts thus: "The Indian members of this [Metlakatla] reservation with the financial support of the Federal Government have been engaged in trapping and canning operations since 1915, and such activity provides the only means of support for substantially all the inhabitants of the reservation." 4 L. Ed. 2d at 35.

[14] In 1936 Senator Gruening, then Director of the Division of Territories and Island Possessions of the Department of the Interior, observed:

> The extension of the economic and social benefits of the Indian reorganization act to Alaska has paved the way for the security of approximately one-half of the present population of the Territory, whose stabilized future is not only an essential act of humanitarianism but also an important item of wholesome advance. [ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR, p. 30 (1936)]

These facts, which must be accepted as true since the instant case is here on appeal from the grant of appellees' motion to dismiss, conclusively show that the anti-fish trap act, as applied to appellant, unconstitutionally burdens an instrument of the Federal Government.

V. THE OPINION OF THE ALASKA SUPREME COURT IS REPLETE WITH LEGAL ERROR

Appellant has previously had occasion to point out that both appellees and the Alaska courts have treated this case and the companion case of Kake and Angoon in such a way as to blur the differences between the respective claims of right. It is necessary to analyze the Alaska Supreme Court's opinion with great care to determine which of its holdings do or do not apply to Metlakatla. Such an analysis demonstrates that in spite of the Court's assertion that "most" of its discussion on Kake and Angoon applies to Metlakatla as well, Opinion, p. 54a, the basis for its decision against Metlakatla is to be found in the concluding portion of its opinion, Opinion, pp. 55a-62a.

A. The Holdings of the Court Below

Placing the appellant's claim of right against the court's holdings, we find that the court made the following determinations with respect to Metlakatla:

1. *The 1891 Act:* Appellant argued that in the absence of an explicit repeal, the 1891 Act remains valid and in force. The Alaska Supreme Court replied:

> [The Metlakatlans] are no more entitled to or in need of fishing advantages over their fellow citizens than any other fishing community of Alaska and we do not believe that Congress intended that their temporary privilege in the waters surrounding their upland reservation continue after Statehood. [Opinion, pp. 61a-62a.]

Indeed, the Alaska Supreme Court went on to cast doubt upon the Act's initial constitutionality:

> Whether Congress had the power to so subsidize an alien immigrant group, even though they were Indian, seems doubtful. [Opinion, p. 62a.]

2. *The Presidential Proclamation:* Appellant argued that the 1916 Presidential Proclamation was valid and in force. The Alaska Supreme Court cast doubt upon its constitutionality as well:

> The power of the President to create an exclusive fishery reservation for such a group seems even more doubtful. [Opinion, p. 62a.]

3. *Section 4 of the Statehood Act:* Appellant relied upon the Statehood Act as expressly preserving the Metlakatla fishery. The Alaska Supreme Court held Section 4 inapplicable or unconstitutional on four separate grounds:

(a) Metlakatla held a "fishing privilege" at the time of the enactment of the Statehood Act, which ". . . did not qualify as a fishing rights as that term is used in Section 4 of the Act, because of its truly temporary nature." [Opinion, p. 60a.]

(b) Even if appellants had a fishing right, Section 4 of the Statehood Act is of no force or effect.

> "If it had been the intent of Congress that [Metlakatla's] privilege continue after Statehood we believe Congress would have so stated because of the affirmative duty imposed by the Alaska constitution to define any such reservation in the act of admission." [Opinion, pp. 60a-61a.]

This is apparently a specific application with respect to Metlakatla, of the Alaska Supreme

Court's general holding that Section 4 of the Statehood Act is totally invalid on the ground that there was no meeting of the minds—and hence "no contract"—between the United States and Alaska on the question of native rights:

> "We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States by the second sentence of section 12 of Article XII of the Alaska constitution and the responsive portion of section 4 of the Alaska Statehood Act. This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were "held" by or for natives at the time." [Opinion, p. 25a.]

(c) Even if Section 4 of the Statehood Act were valid, its amendment by Section 2(b) of the Alaska Omnibus Act was beyond the power of Congress:

> "It is our view that [Section 2(a) of the Alaska Omnibus Act] forms no part of the compact between Alaska and the United States. It was not enacted until ten months after the voters of Alaska had ratified the compact, . . ." [Opinion, pp. 20a-21a.]

The Court apparently believed that the amendment was vital to appellant's claim:

> "As originally enacted it [the second part of Section 4 of the Statehood Act] applied only to 'lands or other property'. As amended it purports to include fishing rights. In the portion of Section 4 immediately preceding, fishing rights were parenthetically included. It is only logical to assume that if it had been intended that fishing rights be included in the section following, along with 'lands or other

property', the same phraseology would have been employed." [Opinion, p. 21a.]

(d) Even if Section 4, with or without its amendment, did form a compact between the United States and Alaska, it is unconstitutional as it violates the equal footing doctrine.

> "To withhold sovereignty over its inland waters from the state in the absence of compelling reasons and without definitely describing in the act of admission the extent of the sovereignty intended to be withheld, would be a violation of the equal footing doctrine." [Opinion, p. 53a.]

4. Appellant predicated its entire argument upon the well documented premise that Indian law applies to its reservation. The Alaska Supreme Court took direct issue with a century of United States history by declaring that general concepts of Federal Indian law have

> "never been applicable to the Alaskan Indian under United States rule . . . [because] Congress has never maintained any guardianship over Alaska Indians . . . [and] . . . has never recognized any Indian tribe, nation or power in Alaska, nor treated the natives as wards in the usual meaning of that term . . . [Opinion, pp. 39a-40a.]

It is respectfully submitted that each one of the foregoing holdings constitutes a grave error of law.

B. The 1891 Act is in Force and Constitutional

As we have demonstrated, Metlakatla's water reservation was established under the authority of the 1891 Act and confirmed and reconfirmed by subsequent legislative, executive, and judicial actions—including the Statehood Act itself. Yet, in the eyes of the State

Court, the water reservation "did not survive Statehood."

If that is so, how did it die? On that point the Court does not offer any enlightenment. It would seem that its conclusion is based on the assumption that the 1891 Act, from which the water reservation was derived, was repealed by the Alaska Statehood Act. Since the 1891 Act granted both land and water rights, appellant's land reservation must also have been repealed. Yet the Alaska Supreme Court, and even the appellees, have hesitated to draw this logical conclusion from their argument.

While it is difficult to conceive of repeal of the 1891 Act by implication, it is even more difficult to conceive of its *amendment* by implication. By what mysterious action did Congress take the water portion out of the 1891 Act and leave the land in it? Alternatively, if it is assumed that the 1891 Act was repealed *in toto*, Congress has by implication—and without notice or hearing—deprived Metlakatla of everything it owns and has owned for seventy years, including the land on which the people of the Community have built their homes.

Merely to state the foregoing propositions is to demonstrate their absurdity. It is a general canon of statutory construction that an earlier specific statute is not repealed by implication by a later general statute. Ex parte *Crow Dog*, 109 U.S. 556, 570-71 (1885). And when dealing with Indian rights this Court has gone further and repeatedly reaffirmed the doctrine that statutes and treaties establishing Indian rights must be liberally construed. This doctrine was restated most recently in *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956):

> Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Worcester* v. *The State of Georgia*, 6 Pet. 515, 582. *Carpenter* v. *Shaw*, 280 U.S. 363, 367.

The Alaska Supreme Court's holding that the 1891 Act has come to an end was apparently influenced by its feeling that the act might otherwise be unconstitutional. The power of Congress, the Court says, "to so subsidize an alien immigrant group, even though they were Indians, seems doubtful."[15] Opinion, p. 62a. The simple answer to this contention is that the power of Congress to pass the 1891 Act has not seemed doubtful to *this* Court. *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918) *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 112-114 (1949). Moreover, the Alaska Supreme Court is apparently unaware that the Indian commerce clause extends the power of Congress to Indian tribes no matter where located. Until the Louisiana Purchase, many Indian tribes were located on

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[15] Metlakatlans are Tsimshian Indians. The aboriginal home of the Tsimshians lies in northern British Columbia but spills over into Alaska to include its southernmost tip. See DEPARTMENT OF EDUCATION, PROVINCE OF BRITISH COLUMBIA, BRITISH COLUMBIA HERITAGE SERIES, Series 1, Volume 6, pp. 9-10. When the ancestors of the present Metlakatlans were invited to Alaska by the Government of the United States, they "migrated" seventy miles from Metlakatla, B.C.

foreign soil. And until 1924 a great majority of American Indians were non-citizens. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, p. 154.

C. The 1916 Proclamation Is Constitutional

To the Alaska Supreme Court the Constitutional validity of President Wilson's 1916 proclamation "seems even more doubtful." Opinion, p. 62a. As we have heretofore pointed out, the *Alaska Pacific Fisheries* decision affirmed a decree which expressly relied on the President's proclamation. Moreover, the Congressional ratification of the proclamation in 1934 most clearly placed the executive act on a statutory par with the 1891 law.

D. The Statehood Act Is Applicable and Constitutional

1. Appellant's rights are "fishing rights" within the meaning of Section 4.

As its first reason for finding that the appellant's fishing reservation was not preserved by the Statehood Act, the Alaska Supreme Court held that the "[water reservation] did not . . . qualify as a fishing right as that term is used in section 4 because of its truly temporary nature". Opinion, p. 60a.

Of course it is difficult to see how rights held without interruption since 1891 are "truly temporary"! But, in any event, the duration of appellant's water reservation is not relevant to the question of whether it was preserved by Section 4. The 1891 Act set aside the Annette Islands for the use of appellant "until otherwise provided by law", 26 Stat. 1101, 48 U.S.C. § 358. Section 4 of the Statehood Act required Alaska to disclaim "any land or other property (including fishing rights)" held by or for Indians. 72 Stat. 339. The

Statehood Act did not say that Indian property or land rights had to be irrevocably held in perpetuity. If it had, it would have been a nullity, for every Indian reservation and the rights appurtenant thereto, whether created by treaty, statute or executive order is, in a sense, "temporary". In every case, Congress retains the ultimate power, whether or not it is expressly reserved, to alter, amend or repeal the rights granted, subject only to the possible application of the due process clause. *Morrison* v. *Work,* 266 U.S. 481, 485 (1915). *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99, 116 (1960). It is therefore irrelevant that the 1891 Act expressly provides that the reservation shall exist until "otherwise provided by law." It is no more or less permanent than any other Indian reservation.

2. Section 4 of the Statehood Act creates a valid compact.

As its second reason for concluding that the Metlakatla water reservation "did not survive statehood," the Supreme Court of Alaska held "no compact as to fishing rights was formed between the State of Alaska and the United States." Opinion, p. 25a. The argument is based upon slight differences in language between Article XII, Section 12 of the proposed constitution of Alaska, which the citizens of the Territory ratified in 1956 as a basis for Alaska's admission to the Union, and Section 4 of the Statehood Act. The relevant portions are:

Alaska Constitution, Article XII, Section 12	Statehood Act, Section 4
The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, *as that right or title is defined in the act of admission.*" (Emphasis supplied.)	As a compact with the United States said state and its people do agree and declare that they forever disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to *which may be held* by any Indians, Eskimos, or Aleuts (hereinafter called natives) *or is held by* the United States in trust for said natives; . . ." (Emphasis supplied.)

The Alaska Supreme Court held:

> A comparison between the offer and response does not indicate definite agreement. The offer to disclaim by the state was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It does not comply with the condition by defining the right or title. [Opinion, p. 18a.]

To this conclusion there are at least three obvious answers. In the first place, Alaska cannot, under the Supremacy Clause, impose conditions by which Congress must abide in enacting a Statehood Act.

Second, Congress did define the "right and title" to lands or other property held by or for Indians as that right and title which "may be held by" or "is held for" Indians. Instead of spelling out what these rights might be, Congress incorporated by reference the existing law, treaties, regulations and other factors relating to Indian fishing rights as they existed at the time of admission. Congress thus elected to preserve the *status*

quo, neither adding to nor detracting from existing Indian rights.

Third, even if the Alaska Supreme Court is correct that a statehood compact can be analogized to an ordinary contract and even if Congress failed to "accept" the offer of the Alaskan people contained in Article XII, Section 12 of the draft Alaska Constitution,[16] Section 4 would still be a valid compact between the United States and Alaska. If Congress did not accept the terms of Alaska's offer, then Section 4 must be considered a "counter offer." This counter offer was accepted by the Alaskan people when, on August 26, 1958, they approved Ordinance 3, which expressly states that:

> All provisions of the . . . [Statehood Act] reserving rights or powers to the United States, as well as prescribing the terms and conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people. [See 72 Stat. 343-44]

If any doubt remained, it would be dispelled by Section 8(b) of the Statehood Act. Out of an abundance of caution Congress had provided in Section 8(b) that if the Statehood Act were accepted by referendum of the Alaskan voters the proposed Alaska Constitution, ratified by the voters in 1956, "shall be deemed amended accordingly". 72 Stat. 443.

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[16] This "offer" must be construed in the light of Article XII, Section 13 of the Constitution of Alaska:

> SECTION 13. All provisions of the act admitting Alaska to the Union, which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people.

3. The Alaska Omnibus Act has no bearing on appellant's rights.

The third major reason assigned by the Alaska Supreme Court for holding that the Metlakatla "water reservation did not survive Statehood", is that Congress attempted in Section 2(a) of the Alaska Omnibus Act, 73 Stat. 141 (1959), to amend Section 4 of the Statehood Act and that this amendment "forms no part of the compact between Alaska and the United States." Opinion, p. 20a.

The court evidently misunderstood the meaning of this provision of the Alaska Omnibus Act. The purpose and effect of the amendment was to enlarge rather than diminish the rights of the Alaskan people. It was designed to *exclude* from the reservation of jurisdiction contained in the second clause of Section 4 *non*-Indian lands and property "the right or title to which is held by the United States." As the Senate and House reports explain, the amendment was designed to:

> [M]ake clear that "the absolute jurisdiction and control of the United States" does not apply generally to land held by the United States in Alaska, but only land and property held by natives or by the United States in trust for natives. [S. REP. No. 311, 86th Cong., 1st Sess. 9 (1959); H. R. REP. No. 369, 86th Cong. 1st Sess. 6 (1959).]

If the Alaska Supreme Court were correct that the amendment is invalid, the result would be that the overwhelming majority of its lands, title to which is in the United States, "shall be and remain under the absolute jurisdiction and control of the United States."

4. Section 4 does not deny Alaska admission to the Union on an equal footing.

In affirming the judgment of the court below, the Alaska Supreme Court expressly affirmed the district court's principal ground of decision: "to deny to new states admitted to the Union ownership of the shores and of the soil beneath navigable waters is a denial of admission on an equal footing." Opinion, p. 49a. Appellant submits that this holding is wholly erroneous.

In essence, the equal footing doctrine provides that if the United States may not constitutionally exercise a certain power in one of the original states it may not exercise that power in a new state, even though the statehood act reserves such power to the United States. Thus in the leading case of *Coyle* v. *Smith*, 221 U.S. 559 (1911), this Court held that Congress could not, as a condition of Statehood, limit Oklahoma's right to select the site for its state capital.

Appellant does not dispute that Congress cannot, *through the exercise of its power to admit new States*, deprive Alaska of sovereignty over its inland waters. The essential point, however, is that Congress retained control of appellant's reservation through the exercise of its powers over Indian tribes, and *not* through the exercise of its power to enlarge the Union. As this Court carefully explained in *Coyle* v. *Smith*:

> In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; *second, between compacts or affirmative legislation intended to operate in futuro, which are within the scope of the conceded powers of Congress over the subject*; and third, compacts or affirmative legislation which operates

> to restrict the powers of any such new state in respect of matters which would otherwise be exclusively within the sphere of state power. [221 U.S. at 568 (Emphasis supplied.)]

Provisions falling into the second class, the Court said, did not deny "equal footing" because they are within the scope of Congressional powers *other than the power to admit new states to the Union.*

These principles, as applied to the facts of this case, demonstrate that Section 4 of the Statehood Act is constitutional. No other conclusion is possible unless the authority of Congress to regulate Indian fishing upon the Metlakatla Reservation were derived solely from its power to admit new States to the Union. But the power of Congress to enact Section 4 is derived from its plenary authority in the field of Indian affairs. As was said by the United States Supreme Court in *Coyle* v. *Smith, supra*:

> [S]tipulations . . . in respect to the control of the United States of the large Indian reservations and Indian population of the new state, are found in the Oklahoma enabling acts. Whatever force such provisions have after the admission of the state may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the state. [221 U.S. at 570.]

Similarly, in *United States* v. *Sandoval,* 231 U.S. 28 (1913), this Court said with regard to a provision of the New Mexico enabling act which declared that the Indian liquor laws would apply to the Pueblo Indians:

> Being a legitimate exercise of [the Congressional] power [over Indian affairs], the legislation in question does not encroach upon the police power

> of the state, or disturb the principle of equality among the states. [231 U.S. at 49.]

Nor is a disclaimer provision, such as that contained in Section 4 of the Alaska Statehood Act, in any way new to the law. The statehood acts for all states which contained a substantial Indian population and were admitted to the Union since 1889 include similar disclaimers. Typical is the provision in Section 4 of the Act admitting Montana, North Dakota, South Dakota, and Washington, 25 Stat. 676, 677 (1889), which declares

> And said [state constitutional] conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of the said States:
>
> . . .
>
> Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, *the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .* (Emphasis supplied.)

See also Statehood Acts for Utah, 28 Stat. 107, 108 (1894); Oklahoma, 34 Stat. 267, 270 (1906); New Mexico and Arizona, 36 Stat. 557, 558-59, 569-70 (1910).

The Arizona disclaimer provision was recently referred to by this Court in *Williams* v. *Lee, supra,* 358 U.S. at 222, n. 10, (1959). Other disclaimer provisions have also been uniformly construed as excluding the authority of the State from the Indian Country

unless and until Congress authorizes State intervention. See, *e.g.*, *Whyte* v. *District Court*, 346 P. 2d 1012 (Colo. Sup. Ct. en banc, 1959), *cert. denied*, 363 U.S. 829 (1960); *In re Pine's Petition*, 99 N.W. 2d 38 (S. Dak. 1959); *Application of Denetclaw*, 83 Ariz. 299, 320 P. 2d 697 (1958); *State* v. *Begay*, 63 N.M. 409, 320 P. 2d 1017 (1958).[17]

E. Federal Indian Law Applies to Alaska Indians Including Appellant

Throughout this litigation appellees have advanced the argument, perhaps somewhat half-heartedly, that appellants Metlakatla, Kake and Angoon are not Indian tribes and that Congress, therefore, lacked authority to legislate with regard to them or, for that matter, with regard to any Indian tribe in Alaska. This Court, in its October Term 1959 opinion, expressed the view that on this issue, too, "enlightenment drawn on the spot by the Alaska Supreme Court may be material to any ultimate determination of federal questions . . ." 363 U.S. at 562.

Here, again, appellant submits, the Alaska Supreme Court has failed this Court. It has discussed the issue, elaborated on it, but does not appear to have reached a definitive conclusion. It comes closest to a holding on the issue of tribal status when it observes:

> What we do say is that most of the facts which created the Indian law authority relied on by appellants are absent from this case. [Opinion, p. 40a.]

[17] The United States District Court for Alaska has recently rendered a decision in which it placed reliance on Section 4 of the Alaska Statehood Act and the Alaska Omnibus Act in direct conflict with the decision of the Alaska Supreme Court in this case. See *United States* v. *State of Alaska*, 197 F. Supp. 834 (D. Alaska, 1961).

Close scrutiny of the Alaska court's opinion raises a serious question as to whether the foregoing statement was intended to apply to all three appellants or to Kake and Angoon alone. In the discussion leading up to the holding on "Indian law authority", the Court makes *inter alia* the following points:

> ". . . Congress has not historically exercised a fostering care over the communities of Kake and Angoon, . . ., nor in fact over any of the Indians of Alaska. . . . It is believed that anything resembling a communal type organization in appellant communities is recent and exists in form to comply with the loan requirements of the Wheeler-Howard Act. [Opinion, p. 38a.]
>
> . . . Congress has never maintained any guardianship over Alaska Indians . . . [Opinion, p. 39a.]
>
> . . . Congress has never recognized an Indian tribe, nation or power in Alaska, nor treated the natives as wards in the usual meaning of that term . . . [Opinion, pp. 39a-40a.]

But at another point in its opinion, the Alaska Supreme Court says the very opposite with regard to Metlakatla:

> Congress has exercised a fostering attitude toward the Metlakatlans far beyond that extended to the natives of Alaska. They were encouraged to immigrate, were given a land reservation, and although they were non-citizens, the Secretary of the Interior gave them permission to fish with traps. The President then gave them an exclusive inland water fishery reservation to supply the cannery subsidized by the government. This concern for their welfare was continued after they had attained United States citizenship and to the present. [Opinion, p. 62a]

While the opinion is not clear, it would appear that the State court did not intend its earlier discussion to apply to Metlakatla. However, on the chance that it did, appellant will demonstrate that the court erred once again.

In its consideration of the issue of Indian status, the Alaska Supreme Court went to great pains to distinguish this Court's holding in *United States* v. *Sandoval,* 231 U.S. 28 (1913). In so doing the Court reveals that it totally misunderstands the *Sandoval* decision. In that case, this Court held that it was for Congress, and Congress alone to decide whether an Indian community is to be recognized and dealt with as such. The question of recognition of an Indian tribe, like recognition of a foreign government, is a political question. "[T]he questions of whether, to what extent, and for what time [Indian communities] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts." 231 U.S. at 46. To the same effect is *United States* v. *Holliday,* 3 Wall. (70 U.S.) 407, 419 (1866):

> [I]t is the rule of this Court to follow the action of the executive and other political departments of the government, whose more special duty is to determine such affairs. If by them those Indians are recognized as a Tribe, this court must do the same.
>
> . . .
>
> Neither the Constitution of the state nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislation of

the state the supreme law of the land, instead of the Constitution of the United States, and the laws and treaties made in pursuance thereof.

The Metlakatla Indian Community, the record shows, has for more than seventy years been recognized by the Federal government as an Indian group to which the Federal authorities have a special relationship. This is exemplified by the following actions:

(1) Congress specifically recognized the Metlakatlans in the 1891 Act and set aside a reservation for them "to be held and used by them in common."

(2) Local self-government of the Metlakatla Community has been recognized by the Secretary of the Interior since 1915, initially under rules and regulations issued by him. See COHEN, HANDBOOK OF FEDERAL INDIAN LAW, p. 415.

(3) In 1944 the Secretary of the Interior approved a Constitution and By-Laws for the Metlakatla Indian Community under the provisions of 25 U.S.C. § 476 and issued a Charter under the provisions of 25 U.S.C. § 477. (Official copies of these documents were submitted directly to this Court at the October Term 1959 hearing.)

(4) Congress has appropriated funds under the "Indian Sanitation Facilities Program", established by 73 Stat. 267 (1959), which have been earmarked explicitly for expenditure on a community water supply project at Metlakatla during the 1962 fiscal year. S. REP. No. 294, 87th Cong., p. 21.

Thus Congressional recognition of the Metlakatla Indian Community and concern for its welfare ranges from March 3, 1891 to as recent a date as June 2, 1961, the date of publication of Senate Report No. 294 of the 87th Congress. The fact is that special Federal assistance with regard not only to Metlakatla but to all

Alaska's natives continues to be expected by responsible officials, including the greatest champion of Alaska statehood, Senator Ernest Gruening. In urging his colleagues to restore funds to the Interior Department appropriation bill for the current fiscal year so as to enable the Department to buy a steamship which would facilitate Federal assistance to Alaska's natives, the Senator declared on June 6 and 7, 1961:

> It would be a body blow to the Secretary of the Interior, *in his responsibility for taking care of the Indians and Eskimos of Alaska,* if this item remains deleted. 107 CONG. REC. 8866 (Daily ed.)
>
> I think it is at least as important to take care of our own population as it is to take care of the needy populations in 105 other areas of the world. There is no alternative unless we intend to deprive many of our own people of the essentials of life. This appropriation is not for a luxury; it is not socialistic. Nothing has changed in this respect since Alaska became a State. These American citizens are dependent on the Federal Government for supplies, for education, and health services . . . They are still, in many respects, the wards of the Federal Government, and *the responsibility of the Federal Government still persists.* 107 CONG. REC. 9044 (Daily ed.) (Emphasis supplied).

CONCLUSION

Felix S. Cohen, whom this Court has recognized as "an acknowledged expert in Indian law" *Squire* v. *Capoeman,* 351 U.S. 1, 8-9 (1956), said in his definitive treatise, the HANDBOOK OF FEDERAL INDIAN LAW (p. 404):

> The legal position of the individual Alaskan natives has been generally assimilated to that of the Indians in the United States. It is now substantially established that they occupy the same relation to the Federal Government as do the In-

dians residing in the United States; that they, their property, and their affairs are under the protection of the Federal Government; that Congress may enact such legislation as it deems fit for their benefit and protection; and that the laws of the United States with respect to the Indians resident within the boundaries of the United States proper are generally applicable to the Alaskan natives.

Acting on the assumption that it has continuing responsibility for the natives of Alaska, the United States has acted to protect Metlakatla's cannery and with it its community from economic ruin. The issue posed by this case is whether the United States has the power to do so. Appellant has demonstrated that the United States has that power. The judgment of the Supreme Court for the State of Alaska should, therefore, be reversed.

Respectfully submitted,

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Date: November 17, 1961

APPENDIX A

Statutes Involved

1. Section 15, Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358:

Annette Islands reserved for Metlakahtla Indians.

Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans, who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

2. Presidential Proclamation No. 1332, April 28, 1916, 39 Stat. 1777:

. . .

WHEREAS the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

WHEREAS it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery,

Now, therefore, I, WOODROW WILSON, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean

low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

3. Sec. 3(c) of the Act of May 7, 1934, 48 Stat. 667:

The granting of citizenship to the Indians described in Section 3(b) of this title shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakatla Colony. And any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to the modification, alteration, or repeal by the Congress or the President, respectively.

4. Section 4, Alaska Statehood Act, 72 Stat. 339 (1958):

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the

right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe. . . .

5. Section 8(b), Alaska Statehood Act, 72 Stat. 343-344 (1958):

At an election designated by proclamation of the Governor of Alaska, . . . there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, by separate ballot on each, the following propositions:

* * * *

"(3) All provisions of the Act of Congress approved July 7, 1958 reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people."

In the event each of the foregoing propositions is adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly. . . .

6. Sec. 2(a) Alaska Omnibus Act, 73 Stat. 141 (1959):

Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives", and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives."

7. Article XII, Section 12, Constitution of the State of Alaska:

The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States.

8. Article XII, Section 13, Constitution of the State of Alaska:

All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people.

9. Chapter 95, Session Laws of Alaska, April 17, 1959:

Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; . . . nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives.

Sec. 2. Section 1 of Chapter 17, SLA 1959, is hereby amended to read as follows:

Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but no limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters owned or hereafter acquired by the State of Alaska. . . .

. . .

Sec. 5. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year, or by a fine not to exceed $5,000.00, or by both such imprisonment and fine.

10. Regulations of the Bureau of Indian Affairs, Department of the Interior, *Commercial Indian Fishing in Alaska*, 25 C.F.R. Pt. 88 (1961 Supp.):

§ 88.1 Scope.

The regulations in this part implement section 4 of the Act of July 7, 1958, 72 Stat. 339, as amended, by declaring existing fishing rights of Indians in Alaska and providing for the protection and control thereof. Provisions for those rights which derive from the Act

of June 6, 1924, as amended, 48 U.S.C. 221 et seq., a
the limitations and sanctions necessary to preser
such rights are included herein. The regulations
this part are permissive, but shall not be construed
a limitation upon any native rights not mentioned
this part.

§ 88.2 Restrictions on Indian traps.

(a) *Subject to the limitations of paragraph (e)
this section,* not more than twenty-one salmon
traps may be, but are not required to be, utilized
the purpose of salmon trap fishing by Indian villag
Such fish trap operations, if the natives elect to enga
in them, shall be conducted as heretofore only at
hereinafter described, and within the fishing distric
and fishing sections defined in the 1960 edition of
regulations of the Alaska Board of Fish and Ga
for Commercial Fishing in Alaska.

• • •

(d) Metlakatla Indian Community (Annette Islan
Fishery Reserve): Salmon trap fishing is permitte
but not required, at the following sites within
southeast section of the Clarence Strait District fro
the opening date set by the State of Alaska for
salmon purse seine fishing in the General Section of
southern district to the closing date set by the State f
any salmon purse seine fishing in the southeast sectio
of the Clarence Strait District, or one week followi
the closing date set by the State for any salmon pur
seine fishing in the General Section of the southern di
trict, whichever date is later:

. . . [description of eight authorized locatio
omitted] . . .

(e) During the 1960 fishing season and until th
Secretary or his authorized representative determin
otherwise, and if the villages elect to operate any fis
traps, the villages may operate traps only at the fol
lowing sites: . . . Metlakatla: (2), (3), (4), and (6).